

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT L. BURNETT)	
Claimant)	
)	
VS.)	
)	
FIBERGLASS ENGINEERING INC.)	
Respondent)	Docket No. 220,246
)	
AND)	
)	
CIGNA INSURANCE CO.)	
Insurance Carrier)	

ROBERT L. BURNETT)	
Claimant)	
)	
VS.)	
)	
WAL-MART)	
Respondent)	Docket No. 223,942
)	
AND)	
)	
INSURANCE CO. STATE OF PA.)	
Insurance Carrier)	

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's Award dated June 24, 2002. The Board heard oral argument on January 7, 2003.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Gary K. Albin of Wichita, Kansas appeared for Fiberglass Engineering, Inc. and Cigna Insurance

Company. James B. Biggs of Topeka, Kansas, appeared for Wal-Mart and Insurance Company of the State of Pennsylvania.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In Docket No. 220,246, the Administrative Law Judge (ALJ) found Fiberglass Engineering Inc. was only liable for compensation due while claimant was working for the respondent. The ALJ denied claimant's heart catheterization reimbursement but awarded the claimant a 12.5 percent permanent partial disability to the right lower extremity in Docket No. 223,942.

The claimant argues the ALJ erred in denying reimbursement for his heart catheterization procedure which claimant argues was reasonable and necessary to cure and relieve the effects of his work-related injury. Claimant argues the respondent, Wal-Mart, is liable for the outstanding medical bills and the functional impairment should be increased to a 15 percent permanent partial disability to the right lower leg.

Respondent, Wal-Mart, and its insurance carrier, Insurance Company of the State of Pennsylvania, argue the ALJ correctly determined the heart catheterization was required because of claimant's chronic heart disease and not because of his injury to his right foot. But they further argue the ALJ erred in finding Wal-Mart and its insurance carrier, Insurance Company of the State of Pennsylvania, liable for claimant's work-related injury. Respondent, Wal-Mart, argues the claimant's initial injury was at Fiberglass Engineering, Inc. and his continuing complaints are a natural and probable consequence of the injury he suffered working for respondent, Fiberglass Engineering, Inc. Consequently, respondent, Fiberglass Engineering, Inc., should be liable for the claimant's injuries. In the alternative, Wal-Mart argues the permanent partial disability compensation should be apportioned between the two docketed claims.

Respondent, Fiberglass Engineering, Inc., and its insurance carrier, Cigna Insurance Company, raised the following issues on review: (1) whether the Board has jurisdiction in Docket No. 220,246; (2) timely written claim; (3) average weekly wage; and, (4) nature and extent of claimant's disability. Fiberglass Engineering, Inc. argues the claimant sustained a permanent aggravation of his condition at his subsequent employment with Wal-Mart and therefore requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Is Docket No. 220,246 subject to Board review?

In one award the ALJ decided claimant's request for benefits for foot injuries presented in Docket Nos. 220,246 and 223,942. Respondent, Fiberglass Engineering, Inc. and its insurance carrier agree that both cases were informally litigated together but there was never an order consolidating the cases. Although claimant listed both docket numbers in his application for review, Fiberglass Engineering, Inc. argues that the issue raised by claimant only applies to the award entered against respondent Wal-Mart. Consequently, Fiberglass argues there was no request for review of the findings in the claim against it.

It is significant in this instance that, while no specific order was entered by the ALJ consolidating the two docketed claims, nonetheless, the parties treated both cases as consolidated with the initial preliminary hearing, the regular hearing and deposition testimony of Drs. Tony J. Fornelli, Edward J. Prosic and Michael J. Poppa being taken at the same time in both cases. And the evidentiary deposition of Patsy Adams Ramey was also taken at the same time. At the regular hearing, the ALJ took stipulations for both cases and then established terminal dates as though these matters were consolidated. Moreover, respondent Fiberglass Engineering, Inc. never objected to consolidated trial of the two claims.

There are no designated rules concerning consolidation of workers compensation claims and how such is to come about in workers compensation proceedings. Review of both civil and criminal statutes outside the Workers Compensation Act provide little guidance as they only provide specific internal rules to follow when consolidation is considered appropriate. Those statutorily designated procedures would not apply to a workers compensation situation unless specifically noted in the Workers Compensation Act. It is noted, however, that the consolidation of workers compensation matters has become a common practice and at times best serves justice and judicial economy in workers compensation litigation. For the parties to be forced to spend the time and money involved in taking multiple depositions when consolidated depositions are appropriate would seem a waste of time, cost, and effort.

In the instant case, the ALJ left the impression of a consolidation of these matters by allowing one regular hearing to suffice and by allowing the deposition testimony of the doctors and witnesses to be taken in both cases together, with all parties represented. The Board also notes the order setting terminal dates by the ALJ was a consolidated order

involving all parties. Therefore, the Board finds that these matters were consolidated for the purpose of regular hearing and the claimant's request for review applies to both Docket Nos. 220,246 and 223,942.

As a matter of fairness, the Board has consistently adhered to its policy holding that all docketed cases which have been consolidated are subject to Board review although only one docket number may have been listed in the application for review. The claims have been tried, argued, and decided as consolidated and remain consolidated for purposes of Board review. To hold otherwise is to lay traps for the unwary. Moreover, because review by the Board is de novo, any issues raised before the ALJ may be considered on review by the Board.

Whether Claimant's Disability was a Natural and Probable Consequence of the Injury in Docket No. 220,246 or the Result of an Intervening Injury in Docket No. 223,942.

It is undisputed claimant suffered a work-related injury on September 21, 1995, while employed by Fiberglass (Docket No. 220,246). As claimant was walking across the floor while working, someone pulled an airhose just as he was stepping over it. Claimant's left foot caught on the hose causing him to twist and injure his right foot. Claimant missed one day of work and was provided treatment with Dr. F. Allen Moorhead Jr.

Claimant was laid off work on February 8, 1996. Claimant was still having problems with his right foot and continued to receive conservative treatment from Dr. Moorhead. On March 5, 1996 claimant was referred to Dr. Sauder for treatment. Dr. Sauder prescribed an orthotic device. Claimant was released from treatment with Dr. Sauder on April 2, 1996, to return on an as needed basis. Dr. Sauder's medical notes indicated the claimant's foot was getting better and the claimant agreed. Claimant testified that after he was laid off and unemployed his foot got better.

Claimant obtained employment with Wal-Mart (Docket No. 223,942) as a janitor in September 1996. His job duties at Wal-Mart included sweeping, mopping, stripping and waxing floors, which required the claimant to be on his feet all day. As he was on his feet all day, he began to experience a worsening of the pain in his right foot.

Claimant indicated he was having pain and a burning sensation as well as numbness in the ball of his foot. Claimant noted the pain was radiating up into his leg at the knee level and worsened the longer he was on his feet. And he described sharp pains if he stepped on his foot wrong. Lastly, claimant noted that when he stood flat footed, his toes did not touch the floor. He testified this symptom did not exist while he worked for Fiberglass. Claimant noted that the condition of his foot worsened throughout the time he worked for Wal-Mart.

In December 1996 claimant was hospitalized for his cardiac problems. While hospitalized and receiving treatment for that condition, claimant was examined by Dr. Tony J. Fornelli, a podiatrist, who diagnosed tarsal tunnel syndrome. Dr. Fornelli prescribed conservative care including a steroid injection which provided some relief. Claimant was then seen by Dr. David J. Clymer who diagnosed mid foot and hind foot sprain with possible mild tarsal tunnel syndrome. Dr. Clymer recommended nonoperative treatment. Claimant was also seen by Dr. John E. Pawsat and an additional steroid injection was given. Dr. Naomi N. Shields saw claimant, diagnosed navicular cuneiform arthritis and opined that tarsal tunnel surgery would not be helpful. Claimant returned to Dr. Fornelli who performed the surgical tarsal tunnel release on April 28, 1999.

Dr. Fornelli opined that claimant initially injured his foot in the accident that occurred at Fiberglass. But the doctor further opined that the initial injury was permanently aggravated by claimant's work at Wal-Mart and such work was the cause of claimant's tarsal tunnel syndrome which led to the surgery.

Dr. Edward J. Prostic opined that claimant suffered a sprain injury to the navicular bone in the 1995 injury while employed at Fiberglass. He further opined that claimant suffered additional aggravation and injury to his right foot each and every day he worked at Wal-Mart. Lastly, Dr. Prostic concluded claimant suffered permanent aggravation to his right foot during his Wal-Mart employment and the tarsal tunnel surgery was a direct result of claimant's Wal-Mart employment.

Dr. Michael J. Poppa evaluated claimant on July 19, 2000, at the request of Wal-Mart's counsel. Dr. Poppa concluded claimant had suffered a substantial injury in his accident in 1995 while employed by Fiberglass Engineering, Inc. The doctor further testified that any injury suffered at Wal-Mart was merely a temporary exacerbation of the injury claimant had suffered while employed by Fiberglass Engineering, Inc. Lastly, Dr. Poppa noted that the tarsal tunnel surgery was not necessary nor a direct result of claimant's Wal-Mart employment.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.¹ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced

¹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

by an independent intervening cause.² In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity at Wal-Mart aggravated, accelerated or intensified the underlying disease or affliction.³

Claimant testified that after his injury at Fiberglass Engineering Inc. his foot condition improved while he was unemployed but after he obtained employment at Wal-Mart his right foot condition worsened with additional symptoms that he had not previously experienced. Drs. Fornelli and Prostic concluded that claimant's employment at Wal-Mart permanently aggravated claimant's right foot and was the cause for the tarsal tunnel surgery. The Board finds that claimant's work at Wal-Mart permanently aggravated claimant's right foot condition. Claimant's condition, which had subsided before his employment with Wal-Mart, therefore, is compensable as an aggravation of his preexisting congenital condition.

The Board is not unmindful of Dr. Poppa's opinion that claimant's work at Wal-Mart merely resulted in a temporary exacerbation of the injury suffered at Fiberglass Engineering, Inc. However, the doctor also assigned a permanent impairment rating for claimant's right foot as a result of his work with Wal-Mart. It is inconsistent to determine there was only a temporary exacerbation and then assign a permanent impairment for that alleged exacerbation. Dr. Poppa also termed claimant's injury at Fiberglass as substantial but could not identify any medical records to support that designation of the injury. Moreover, the claimant was simply diagnosed with a strain or sprain after the 1995 accident. In summation, the Board concludes the claimant's testimony coupled with Drs. Fornelli and Prostic's testimony is more persuasive and accorded more weight than Dr. Poppa's contrary opinion.

The Board affirms the ALJ's determination that claimant suffered a permanent aggravation to his right foot and a compensable injury during his employment with Wal-Mart. Moreover, the Board adopts the determination that such employment was the cause for the tarsal tunnel surgery.

Timely Written Claim

² *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

³ See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

Respondent, Fiberglass Engineering, Inc., contends that it did not receive timely written claim for compensation. Claimant testified that he had given the plant nurse written claim. Conversely, the plant nurse adamantly denied receipt of such written claim. Claimant had clearly notified Fiberglass of his injury and was provided medical treatment. Moreover, the plant nurse agreed that claimant's file contained medical billings submitted by the claimant for payment which were accompanied by a form from the hospital signed by the claimant.⁴ In the context of requesting payment of medical bills for treatment for the work-related injury these documents suffice for timely written claim.

Average Weekly Wage

Respondent, Fiberglass Engineering, Inc., raised the issue of claimant's average weekly wage. The ALJ adopted the average weekly wage suggested by respondent and the Board agrees. Claimant testified that he earned \$7.50 an hour on the day shift which would result in a \$300 average weekly wage. Although there was testimony that claimant earned more on the evening shift, nonetheless he agreed that at the time of his injury he was working the day shift. The ALJ's finding of average weekly wage while claimant was employed by respondent, Fiberglass Engineering Inc., is affirmed.

Nature and Extent of Disability

Dr. Michael J. Poppa utilizing the *AMA Guides*,⁵ determined claimant suffered a 10 percent impairment and Dr. Prostic, likewise utilizing the *Guides*, determined claimant suffered a 15 percent impairment. The ALJ averaged the ratings and determined claimant suffered a 12.5 percent permanent partial functional impairment to the right lower extremity. The Board agrees and adopts that finding.

It should be noted that both doctors offered opinions apportioning their impairment ratings between the claimant's injuries at Fiberglass and Wal-Mart. The Board is mindful that respondent Wal-Mart contends the doctors' testimony established that claimant had some preexisting functional impairment to his right lower extremity and that K.S.A. 44-501(c) requires a preexisting functional impairment be applied to reduce the award, if the injury is an aggravation of a preexisting condition. But the Board questions the doctors' opinions because there was not an analysis and determination of the preexisting impairment based on the *AMA Guides*, as required by statute.⁶ Instead the doctors merely speculated that a percentage of claimant's current disability was due to claimant's

⁴ Ramey Depo., Ex. 7.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

⁶ See K.S.A. 1996 Supp. 44-501(c).

preexisting condition which was never identified based on the *AMA Guides*. Accordingly, the Board finds the record failed to prove whether claimant had any preexisting functional impairment.

Was the Heart Catheterization a Reasonable and Necessary Medical Expense?

Claimant suffered a work-related injury to his foot. Surgery was recommended. Claimant wants respondent to pay for certain medical treatment related to his heart condition. It is not alleged that the heart condition was caused or aggravated by the work-related accident. Rather, it is alleged that because the authorized physician would not operate to correct the foot injury until after the heart condition was treated, the treatment for the heart should be compensable under the Act. The ALJ denied claimant's request regarding the expenses for the heart catheterization finding that the treatment for the heart condition was not necessary to cure and relieve the employee from the effects of the injury.

The controlling statute for the dates of accident in these two claims was K.S.A. 1996 Supp. 44-510(a). That statute states, in pertinent part:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁷

K.S.A. 44-510(a), as noted above, requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury." The case law interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.⁸

There is no question but that claimant suffered compensable injuries, in connection with this claim. The statute requires that he be provided such medical treatment as is "reasonably necessary" to treat and relieve the effects of those injuries.

⁷ The quoted language was inserted in K.S.A. 44-510h when K.S.A. 44-510 was repealed by the 2000 Legislature.

⁸ See *Carr v. Unit No. 8169*, 237 Kan. 660, 703 P.2d 751 (1985); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935).

The authorized treating podiatrist had determined that a surgical tarsal tunnel release was the appropriate treatment necessary to cure and relieve claimant from the effects of the foot injury. Because of claimant's history of heart problems, Dr. Fornelli requested a surgical consult with a cardiologist before proceeding with the tarsal tunnel surgery. The cardiologist indicated claimant had coronary artery disease involving two or three vessels and recommended angioplasty.

Dr. Fornelli indicated that before the tarsal tunnel surgery could be performed it was necessary for claimant to undergo the heart catheterization and/or angioplasty. The doctor agreed that the heart blockages were obviously not related to his foot injury. The doctor noted because of the cardiologist's findings he would not proceed to perform the tarsal tunnel surgery until the heart problems were corrected. But the doctor agreed that claimant needed the heart catheterization regardless of the pending tarsal tunnel surgery. Stated another way, Dr. Fornelli felt that the tarsal tunnel surgery was reasonable and necessary treatment for claimant's foot injury but in order to perform the foot surgery it was necessary for claimant to first undergo the heart catheterization to address the preexisting coronary artery disease.

When claimant was referred by Dr. Fornelli to a cardiologist for consultation before the tarsal tunnel surgery, the claimant testified that he was not having any chest pains. However, the medical records from the cardiologist who performed the heart catheterization on March 15, 1999, indicate that claimant's chief complaint was chest discomfort and that he was seen in the office with recurrent chest pain.⁹ In a letter to claimant's attorney dated July 29, 1999, Dr. Fornelli wrote in pertinent part:

This letter is in regards to the heart catheterization that Mr. Burnett underwent on March 16, 1999. While reviewing Mr. Larry Burnett's medical record in preparation for the tarsal tunnel release, his significant history of coronary artery disease came to my attention. More specifically, an angiogram, which did reveal significant blockage in several arteries. **His cardiologist advised him to have these blockages removed as it could be life threatening. Apparently because of the present situation, he did not have the procedure undertaken. When I sent Mr. Burnett to a cardiologist, i.e., Dr. Arcot for cardiac consult, he recommended that the blockages be removed by performance of a percutaneous balloon angioplasty. He also said this should have been done before and it would lessen the patient's risk of a cardiac problem.** I do consider it to be in furtherance of his worker's compensation claim, because it would be performed to

⁹ P.H. Trans. (Oct. 6, 1999), Resp. Ex. 1.

clear the patient for the tarsal tunnel surgery. I am sure Dr. Arcot would concur in this matter.¹⁰ (Emphasis added)

This indicates claimant should have had the catheterization/angioplasty procedure performed regardless of the connection to the tarsal tunnel surgery. And Dr. Fornelli agreed, he testified:

Q. And I'm asking you again do you think he would have needed this treatment regardless of the tarsal tunnel syndrome?

A. Yes.¹¹

The Board affirms the ALJ's determination that claimant is not entitled to reimbursement for the heart catheterization procedure.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Jon L. Frobish dated June 24, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁰ Fornelli Depo., Ex. 2.

¹¹ Id. at 27.

c: William L. Phalen, Attorney for Claimant
Gary K. Albin, Attorney for Respondent, Fiberglass Engineering Inc.
James B. Biggs, Attorney for Respondent, Wal-Mart
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director